

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-841

WILLIAM D. OGLES

vs.

ELIZABETH JOHNSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Elizabeth Johnson (mother) and William D. Ogles (father) had a child in 2014. The parties, who never married, have had a volatile relationship. In October of 2015, the father filed a complaint pursuant to G. L. c. 209C seeking shared legal and physical custody of the child. The mother filed a counterclaim seeking sole legal and physical custody. Pursuant to an order dated January 25, 2016, the mother was granted temporary physical and legal custody of the child, and was permitted to temporarily relocate to New Jersey. The order granted the father parenting time in New Jersey and required him to undergo alcohol testing.¹ In addition, a guardian ad litem (GAL) was appointed to examine the issue of removal, and to investigate, evaluate, and make recommendations relating to the parties'

¹ In a subsequent temporary order, the father was prohibited from consuming alcohol during his parenting time with the child.

allegations of domestic and alcohol abuse, and the child's exposure to domestic abuse or "serious discord." In her report, the GAL concluded, among other things, that the father had perpetrated domestic violence against the mother, and recommended that the mother receive sole legal custody of the child.

Following a two-day trial, the judge issued an amended judgment, dated April 9, 2018, that (1) granted the parties joint legal custody, (2) gave the mother primary physical custody, and (3) allowed the mother to permanently remove the child to New Jersey. The judge rejected the GAL's recommendation to grant the mother sole legal custody, expressing "concern[]" regarding the GAL's conclusion "that father was the sole perpetrator of abuse and [the GAL] spoke with no one other than mother who witnessed [the] abuse." The judge found that "[t]he credible evidence at trial" demonstrated that "the parties engaged in a volatile relationship wherein they were both verbally and, at times, physically abusive to one another." The judge also found that neither party testified credibly about the domestic violence in their relationship, each assigning "[one hundred percent] of the blame on the other." The judge further found that the "intensity" of the parties' relationship has been detrimental to the child. However, the judge found that, despite their tumultuous relationship, the

parties had been able to reach agreement on major decisions regarding the child in the past.

On appeal, the mother solely challenges the amended judgment's award of joint legal custody, arguing that the judge (1) failed to make detailed positive findings to support an award of joint legal custody, as required by G. L. c. 209C, § 10 (a); (2) failed to consider how shared legal custody was in the child's best interests given the parties' history of violent and abusive behavior; (3) made "meager" subsidiary findings based on inferences that could not reasonably be drawn from the evidence; and (4) failed to consider all factors relevant to the legal custody determination and "unfairly" weighed the evidence.

Discussion. "The determination of custody rests within the discretion of the judge." Kendall v. Kendall, 426 Mass. 238, 251 (1997), cert. denied, 524 U.S. 953 (1998). However, "[t]he material facts found and reported must support the judge's action in awarding joint legal custody to the parties." Id. "[A]n error of law apparent on the record, or the absence of evidence in support of findings, or the failure of the findings to support the judge's orders will constitute 'an abuse of discretion' and require reversal." Prenaveau v. Prenaveau, 81 Mass. App. Ct. 479, 486 (2012). See Freedman v. Freedman, 49 Mass. App. Ct. 519, 521 (2000).

We have reviewed the record carefully and conclude that the judge's findings do not support an award of joint legal custody and, consequently, that so much of the amended judgment that orders joint legal custody constitutes an abuse of discretion. Joint or "[s]hared legal custody" connotes "continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development." G. L. c. 208, § 31. See Mason v. Coleman, 447 Mass. 177, 181-182 (2006). "Although complete agreement between parents to implement joint custody may not be necessary, in order to be effective, joint custody requires two capable parents with some degree of respect for one another's abilities as parents, together with a willingness and ability to work together to reach results on major decisions in a manner similar to the way married couples make decisions" (quotation and citation omitted). Rolde v. Rolde, 12 Mass. App. Ct. 398, 405 (1981). See Mason, supra at 182 (shared custody arrangement is "generally appropriate only if the parties demonstrate an ability and desire to cooperate amicably and communicate with one another to raise the children"); O'Connell v. Greenwood, 59 Mass. App. Ct. 147, 155 (2003) ("orders for joint custody, physical or legal, cannot succeed without a true commitment to collaboration rarely produced by the hammer of contempt").

Contrast Doe v. Doe, 16 Mass. App. Ct. 499, 502 (1983) (where, although there was conflict between parties, joint legal and physical custody was appropriate, as conflict concerned relationship between parties and their inability to communicate and not specific areas of disagreement regarding child's care, custody, and upbringing).

Here, though the judge did find that the parties have been able to agree on some decisions regarding the child, for the most part, the findings describe a highly contentious relationship.² See Smith v. McDonald, 458 Mass. 540, 553 (2010) ("Joint custody is inappropriate for parents whose relationship to date has been dysfunctional, virtually nonexistent, and one of continuous conflict" [quotation and citation omitted]). While we are mindful of the deference to be accorded a judge's custody determination, see Prenaveau, 81 Mass. App. Ct. at 486, here, the judge's findings, taken together and as set forth above, do not support the conclusion that the parties can meaningfully cooperate in making decisions for the child. As such, so much of the amended judgment as orders joint legal custody cannot stand, and on remand the amended judgment shall be modified to order sole legal custody of the child to the mother. On remand, the judge may determine appropriate

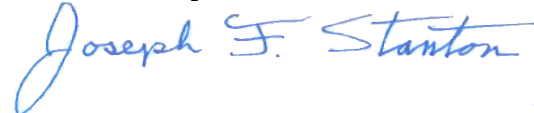
² We note that given the level of conflict between the parties, the judge ordered the parties to communicate in writing.

parameters for sole legal custody, including the extent to which the mother shall be obligated to inform, and seek input from, the father regarding major life decisions pertaining to the child's health, education, and welfare. We note, however, that the mother shall be granted final decision-making authority in all instances where the parties cannot agree.

Conclusion. So much of the amended judgment as awards the parties joint legal custody of the child is vacated, and the matter is remanded to the Probate and Family Court for modification of the amended judgment consistent with this memorandum and order.

So ordered.

By the Court (Vuono,
Wolohojian &
McDonough, JJ.³),



Clerk

Entered: June 20, 2019.

³ The panelists are listed in order of seniority.